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IN THE

Supreme Court of the United States

FRED O. DICKINSON, ET AL.,
Petitioners,
v.
MARY ANN COLLIER, ET AL.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Drivers' Privacy Protection Act ("DPPA") creates a private right of action for damages against State officials for enforcing State laws, policies and practices that allegedly violate the DPPA.

2. Whether a cause of action for billions of dollars in damages against State officials for enforcing State law for the sole benefit of the State and in compliance with State law requirements violates the Eleventh Amendment to the United States Constitution.

3. Whether a federal right is "clearly established" for purposes of qualified immunity when it arises under a federal statute never previously held to create a private cause of action against state actors and when the State officials' conduct complies with mandatory State law obligations.

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INTRODUCTION

Petitioners are current and former high-level state officials at the Florida Department of Highway Safety & Motor Vehicles (DHSMV) responsible for establishing policies governing the confidentiality of personal information that the DHSMV collects, in compliance with state and federal law. Petitioners do not contest that for more than four years after the relevant provisions of the Drivers' Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725 (DPPA) became effective, they knowingly violated its confidentiality provisions by selling citizens' private driver information to mass-marketing firms without the drivers' affirmative consent. The Eleventh Circuit rightly held that under the DPPA's express private right of action, petitioners may be liable for violating respondents' clearly established rights under the Act. Whether petitioners will actually be held liable in this case, once their defenses on the merits are considered, remains to be seen, as does the scope of any liability if respondents prevail.

Petitioners nonetheless ask this Court to take the unusual step of granting immediate review of the court of appeals' interlocutory judgment. In support of this extraordinary request, petitioners do not allege that the Eleventh Circuit's decision conflicts with any other court's construction of the DPPA. Nor do they claim that any court has found that the Eleventh Amendment bars personal-capacity suits against state officials under the DPPA. Instead, petitioners ask this Court to intervene at the outset of this case to review a question of statutory interpretation that arises infrequently, a constitutional objection that has never before been

considered, and a fact-bound denial of qualified immunity. None of these questions warrants this Court's review. Indeed, the questions do not even arise in this case because, contrary to petitioners' assertion, state law did not compel, or even permit, them to compile and sell respondents' private driving records to mass-marketers.

Presumably aware that review in such circumstances is rarely granted, petitioners place critical importance upon their speculation that if this case is allowed to proceed, petitioners may face billions of dollars in liability. *See* Pet. 4. This Court was rightly unmoved by a nearly identical argument when it denied certiorari in another interlocutory appeal arising from DPPA-related litigation just two Terms ago. *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari). Any claims arising from the size of petitioners' potential liability is premature, as class certification has not yet been granted, the merits of petitioners' numerous defenses have yet to be considered, and several questions regarding the scope and availability of a monetary remedy remain to be resolved.

STATEMENT

1. In 1989, a stalker obtained actress Rebecca Schaeffer's unlisted home address from a state motor vehicles department, went to her home, and murdered her. This highly publicized crime raised awareness of the threat to public safety posed by the sale of personal driver records and led Congress to hold hearings on proposed federal legislation. During its investigations, Congress became aware that many

states, like Florida, sold drivers' personal information—including names, phone numbers, social security numbers, and addresses—to mass marketers, raising hundreds of millions of dollars for the states at the cost of citizens' important privacy interests and personal safety. Sec. Amend. Compl. ¶ 12A(xvi); *see also* 138 Cong. Rec. H1785 (1992); 139 Cong. Rec. E2747 (1993); 139 Cong. Rec. S15745, S15761 (1993); 140 Cong. Rec. H2518 (1994).

In response, Congress enacted the DPPA. That Act prohibits a "State department of motor vehicles, and any officer, employee, or contractor thereof," from "knowingly disclos[ing] or otherwise mak[ing] available to any person or entity" personal information contained in driving records, except under certain limited circumstances. 18 U.S.C. § 2721. As originally enacted, the law allowed States to disclose a driver's personal information for bulk distribution in surveys, marketing, or solicitations if the State implemented methods and procedures to provide individuals a clear and conspicuous opportunity to prohibit such use. *Id.* § 2721(b)(12) (1997). However, the Act required States to keep the information of those drivers who chose to "opt-out" strictly confidential. *Id.* § 2721(b)(12)(B) (1997).

To ensure vigorous enforcement of the Act, and to provide compensation for victims of its violation, Congress established an express private right of action under the statute. The Act thus provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains . . . ." *Id.* § 2724(a). The statute provides

that the term "person" includes "an individual, organization or entity, but does not include a State or agency thereof." *Id.* § 2725(2). It also provides that a court "may" award successful plaintiffs actual or liquidated damages, punitive damages, reasonable attorneys' fees, and other such relief as the court deems appropriate. *Id.* § 2724(b). The Act authorizes the Attorney General to impose civil penalties for noncompliance on state departments of motor vehicles, *see id.* § 2723(b), but not against state employees, *id.*, upon whom the Act imposes explicit duties, *id.* § 2721(a).

2. The DPPA went into effect on September 13, 1997, three years after its enactment. The interim period allowed several states that engaged in practices the Act now prohibited, including Florida, to modify their laws and policies to come into compliance with the new federal law. Petitioner Fred Dickinson, as Executive Director of the DHSMV, was the Florida official ultimately responsible for ensuring that the Florida DHSMV complied with the DPPA.[1] *See* Sec. Amend. Compl. ¶ 12A(i), (iv). Aware that state law conflicted with the DPPA, petitioner Dickinson took an active role in lobbying the state legislature to amend its public records laws to conform to the federal requirements. *Id.* ¶ 12A(vi). In 1997, just before the DPPA came into effect, Florida enacted such legislation. Under the new, DPPA-compliant state law, the DHSMV allowed drivers to elect to block disclosure of their personal information for marketing or other restricted

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[1] Dickinson was appointed to that position in 1992 and still held that position when this suit was filed. Sec. Amend. Compl. ¶ 12A(i).

purposes, but DHSMV continued to sell the personal information of drivers who did not "opt out." FLA. STAT. § 119.07(3)(aa)(12) (2003).

3. It soon became apparent to Congress that the "opt-out" provisions of the original version of the DPPA did not adequately protect drivers' privacy. Accordingly, on October 9, 1999, Congress amended the statute to require states to protect drivers' personal information from disclosure unless drivers "opt in" to a state's marketing program. Specifically, the new legislation (known as the Shelby Amendment) required every state motor vehicle department to obtain express consent from an individual before releasing his or her personal information for bulk distribution for surveys, marketing, or solicitations. 18 U.S.C. § 2721(b)(12). Congress set the Amendment's effective date as June 1, 2000 for most States, giving those States nearly eight months to bring their policies and practices into compliance. Pub. L. No. 106-69, 113 Stat. 986, 1025.

Petitioners became aware of the Shelby amendment and its conflict with existing DHSMV practices shortly after its enactment. In early 2000, the American Association of Motor Vehicle Administrators contacted petitioner Sandra Lambert, the DHSMV official responsible for monitoring compliance with changing laws and rules, advising her of the new "opt-in" requirement and proposing methods for helping the agency comply with the new federal law. Sec. Amend. Compl. ¶ 12C(v)-(vi), (xii).[2]

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[2] The final petitioner-defendant, Carl Ford, served as Assistant Director (and in 2001 became the Director) of the Division of Motor Vehicles, overseeing the budget and

Around the same time, petitioner Dickinson received a legal memorandum from his staff analyzing this Court's then-recent decision in *Reno v. Condon*, 528 U.S. 141 (2000). *Id.* ¶ 12A(xi). That decision rejected a constitutional challenge to the DPPA and, in the process, noted that the Shelby Amendment had recently changed the statute to permit disclosure only when a driver has given express consent. *Condon*, 528 U.S. at 144-45. The day Dickinson received the memo, he wrote a letter to the tax collector for Pinellas County, Florida, advising that "Congress recently amended the DPPA and further restricted the states' ability to disseminate personal information contained in motor vehicle records . . . These changes take effect on June 1, 2000 . . . ." Sec. Amend. Compl. ¶ 12A(ix).

The next day, Dickinson conducted an executive staff meeting with petitioner Lambert and others to discuss the effect of the Shelby Amendment. At that meeting, Dickinson's legislative affairs administrator, Sherry Slepin, reported that the Shelby Amendment would make it unlawful to disclose driver information for bulk distribution without first obtaining a person's affirmative consent. *Id.* ¶ 12A(xiii).

Petitioners continued to receive advice from Slepin about the status and effect of state and federal laws and regulations impacting the DHSMV. *Id.* ¶ 12A(xiv). Petitioner Dickinson had numerous discussions with Slepin regarding the financial impact of the "opt-in" requirement. *Id.* ¶ 12A(xv). Slepin testified to the Florida House Committee on

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operations of the Division, including the processing of public information requests. *Id.* ¶ 12B(i)-(ii).

Transportation that the Shelby Amendment would result in a loss to the State of around $1.6 million per year. *Id.* ¶ 12A(xvi).

By June 1, 2000, the Shelby Amendment's effective date, Florida was the only state whose laws failed to comply with the new requirements of the revised DPPA. *See Kehoe*, 547 U.S. at 1051 (Scalia, J, concurring in the denial of certiorari). Although aware that the Act now prohibited DHSMV's current practices, petitioners nonetheless decided to continue to sell to mass marketers recompilations of the personal information of Florida drivers who had not opted out of the program. *Id.* ¶¶ 12A(xviii), 12B(vii), 12C(xv). There was no question during this time that state law not only permitted but required petitioners to comply with the DPPA. The State's *Government-in-the-Sunshine Manual*, issued by the Attorney General to assist state agencies in complying with state public disclosure laws, specifically provided that records must remain confidential "when there is an absolute conflict between federal and state law relating to confidentiality of records." Vol. 26, p. 242. Moreover, Florida's sunshine laws did not require disclosure of commercial recompilations of driver data in any event, *see* infra n.9; and, in fact, the State Constitution recognizes citizens' right to privacy. Petitioners nonetheless continued to knowingly violate federal law – and thereby state law as well – for more than *four years*, waiting until the state legislature expressly amended state statutes to reflect the requirements of the DPPA in 2004. *See* FLA. STAT. § 119.07(3)(aa)(12) (2004).

4. Respondents, four Florida drivers and vehicle owners, brought suit against petitioners in their

personal capacities for compiling, reformatting, and selling respondents' personal information to mass marketers without their express consent between the Shelby Amendment's effective date of June 1, 2000 and petitioners' eventual compliance with the Amendment in September 30, 2004. Sec. Amend. Compl. ¶¶ 5-7, 12A(xviii), 12B(vii), 12C(xv). Respondents sought to recover for the violation of their DPPA rights under 42 U.S.C. § 1983 and directly under the DPPA's express private cause of action. *Id.* ¶¶ 25-35.[3] Respondents further requested that the district court certify a class action. *Id.* ¶¶ 15-23.

Prior to ruling on respondents' motion for class certification, the district court dismissed the complaint, finding petitioners entitled to qualified immunity. The court agreed with respondents that petitioners were subject to the DPPA's private right of action. Pet. 37a. And because petitioners did not dispute, at this stage, that they had violated respondents' DPPA rights, the district court held that respondents' "allegations, if true, establish a statutory violation." *Id.* Nonetheless, the court held that petitioners were entitled to qualified immunity because in the court's view, "the state of the law was not sufficiently clear to provide the [petitioners] with 'fair warning' that their conduct violated a statutory right under the novel circumstances of this case." *Id.* at 37a-39a.

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[3] Petitioners also alleged a violation of their constitutional right to privacy. Sec. Amend. Compl. ¶ 25. The district court dismissed that claim and the Eleventh Circuit affirmed. Pet. App. 3a-4a.

5. The Eleventh Circuit reversed the grant of qualified immunity. *Id.* at 10a-11a. Like the district court, the court of appeals found that "the plain language of the DPPA clearly, unambiguously, and expressly creates a statutory right which may be enforced by enabling aggrieved individuals to sue persons who disclose their personal information in violation of the DPPA." *Id.* at 6a. In the alternative, the court held that respondents also had a cause of action under 42 U.S.C. § 1983 against petitioners for the violation of their statutory DPPA rights under color of law. *Id.* at 6a-9a.

The court of appeals then reversed the grant of qualified immunity, finding that "the plain language of the statute and the case law gave clear notice to [petitioners] that releasing the information in question violated federal law." *Id.* at 9a. Although aware that petitioners asserted that state law compelled their actions, and that no court previously had reason to apply the DPPA to conduct precisely like petitioners', the court of appeals found that "[t]he words of the DPPA alone are specific enough to establish clearly the law applicable to [petitioners'] particular conduct and circumstances and to overcome qualified immunity." *Id.* (citation and internal quotation marks omitted). Lest there be any doubt, the court noted, this Court itself had made it clear in *Condon* that the Shelby Amendment requires a state to "obtain a driver's affirmative consent" before "disclos[ing] the driver's personal information for use in surveys, marketing, solicitations, and other restricted purposes." *Id.* at 10a (quoting *Condon*, 528 U.S. at 144-45) (emphasis omitted).

REASONS FOR DENYING THE WRIT

Petitioners' request for interlocutory review of the court of appeals' ruling on a question of first impression is premature in every sense of the word. The request is made too early in the development of the law regarding the scope of the DPPA's private right of action because this is the first decision from any court of appeals to confront it. The request for review is also brought too early in the life of this case, arising not after final judgment—when this Court could more accurately assess petitioners' claims regarding the financial impact of the litigation upon the State—but upon the denial of qualified immunity on the pleadings. That denial was correct, in any event, as there is no question that petitioners knowingly and persistently violated respondents' clearly established rights under the DPPA. Taking the complaint as true, nothing in the statute or this Court's qualified immunity jurisprudence could have led petitioners to a reasonable belief that they could ignore the plain mandate of a federal statute, even if state law had permitted a contrary course of action, or because they might have thought that they could get away with violating federal law without risk of personal liability.

I. The Eleventh Circuit's Construction Of The DPPA Does Not Warrant Interlocutory Review.

Petitioners first seek review of their claim that state officials are not "persons" subject to suit under the DPPA when enforcing state laws, policies, and practices that violate the Act. That issue does not warrant review by this Court at this time as it

implicates no circuit conflict, arises rarely, and can be addressed, if necessary, on review of a final judgment. Indeed, this Court recently denied review of an interlocutory appeal in a similar case involving the DPPA that purported to raise "an important question of statutory construction," and the specter of "enormous potential liability." *See Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in the denial of certiorari). There is no basis for a different result here.

A. The Eleventh Circuit's Decision Does Not Conflict With The Decisions Of This Or Any Other Court.

Petitioners do not argue that review by this Court is required to resolve any division of authority regarding personal-capacity suits against state officials under the DPPA. And, in fact, no such division exists. This question has rarely arisen and the few times it has, the courts have permitted the suit to go forward.[4]

Unable to point to a division over the proper interpretation of the DPPA, petitioners attempt to insinuate a circuit split at a higher level of generality by citing cases construing the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). *See* Pet. 15-16. But none of the decisions petitioners cite purports to establish a general principle, applicable to all legislation, that statutes must be construed to exclude state officials

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[4] In addition to the court of appeals' decision in this case, at least one district court has concluded that the term "person" in § 2724(a) includes state officials. *See Smith v. Ill. Sec'y of State*, No. 01C1605, 2003 WL 1908020 (N.D. Ill. Apr. 21, 2003).

from personal liability whenever they enforce state policies. As petitioners themselves repeatedly emphasize, whether a state official may be sued under a particular statute depends critically on the particulars of that statute—the language of the statute, "the design of the statute," "the statutory context," and "the structure of the [statute]'s remedial provisions." *Id.* It is thus unsurprising that even the circuits petitioners cite construe some statutes to permit personal capacity suits against state officials, and others to preclude them. *See id.* at 16 (relying on the Tenth Circuit's refusal to allow personal capacity suit under Americans with Disabilities Act, but acknowledging that the same court permits such suits under the Family and Medical Leave Act).[5]

The only reliable way to determine whether the Eleventh Circuit's decision will conflict with other circuits' interpretation of the DPPA is to wait until

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[5] Petitioners' suggestion that there is a conflict between the decision in this case and the Tenth Circuit's decision in *Butler v. City of Prairie Village, Kansas*, 172 F.3d 736 (10th Cir. 1999), is particularly strange. The Tenth Circuit's decision itself notes that on the question actually decided in *Butler*—whether the ADA permits personal capacity suits against supervisory employees—the Tenth and Eleventh Circuits are in complete accord. *See Butler*, 172 F.3d at 744 (citing *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996)). The Eleventh Circuit's construction of the ADA's employment provision is likewise consistent with the Fourth Circuit's decision in *Lizzi v. Alexander*, 255 F.3d 128, 136-38 (4th Cir. 2001), *abrogated on other grounds by Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), which construed another federal employment statute, the FMLA, as not imposing liability on state agents who are not "employers" subject to the Act.

those circuits are confronted with and decide the issue presented here.

B. Petitioners' Claims Concerning The Potential Financial Impact Of This Litigation Upon The State Are Premature.

In an attempt to overcome the lack of a circuit split and the infrequency with which the first question presented arises, petitioners resort to claims of financial calamity for the State unless this Court disregards its ordinary standards for certiorari and grants immediate interlocutory review. Pet. 4. This argument is both familiar and premature.

The argument is familiar because this Court recently denied review when confronted with nearly identical arguments raised by private defendants sued for purchasing drivers' personal information from the Florida DHSMV in violation of the DPPA. *See Kehoe*, 547 U.S. at 1051 (Scalia, J, concurring in the denial of certiorari). *Kehoe* presented the question whether a plaintiff must show "actual damages" to recover under the DPPA's liquidated damages provision. *Id.* The district court had granted summary judgment on that question, and the Eleventh Circuit reversed. *See Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005). Petitioners argued that the $40 billion possibly at stake in the litigation warranted this Court's immediate review. *Kehoe*, 547 U.S. at 1051 (Scalia, J., concurring in the denial of certiorari); Petition for a Writ of Certiorari at 8-12, *Fid. Fed. Bank & Trust v. Kehoe*, 547 U.S. 1051 (2006) (No. 05-919). But, as Justice Scalia explained, even if the size of a judgment might provide an eventual basis for this

Court's review, certiorari was premature until that judgment was issued and became final. *Kehoe*, 547 U.S. at 1051 (Scalia, J., concurring in the denial of certiorari).

Petitioners have provided no reason why this case warrants a different result. As in *Kehoe,* there has been no determination of liability, and petitioners "strongly dispute plaintiffs' claims" on the merits. Pet. 4.[6] In fact, petitioners' claims about the scope of their potential liability are even more speculative than those made in *Kehoe*. First, the district court has not yet ruled on respondents' motion for class certification. As a result, petitioners presently face only four individual plaintiffs with combined liquidated damages claims of only $10,000.

Second, even if the district court grants class certification and finds petitioners liable, it is uncertain what damages the court would award respondents. The DPPA provides that the "court *may* award" one of four types of relief, including liquidated damages. 18 U.S.C. § 2724(b) (emphasis added). The Eleventh Circuit has held that "the use of the word 'may' implies a degree of discretion," leaving open the possibility that the district court may award less than the full amount of liquidated damages permitted by the statute. *Kehoe*, 421 F.3d at 1217.

Third, it is by no means certain that the State will ultimately bear the cost of any eventual judgment against these individual defendants. The State is under no federal obligation to indemnify petitioners. Instead, Florida has voluntarily

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[6] On October 29, 2007, petitioner Lambert sought an order to amend her answer..

established a risk management trust fund "to provide insurance . . . for . . . federal civil rights actions under 42 U.S.C. § 1983 or similar federal statutes." FLA. STAT. § 284.30 (2007). It is unclear whether the DPPA qualifies as a "similar federal statute[]," and in any case, the state legislature controls the scope of any indemnification and may amend its insurance scheme whenever it chooses.

C. Reversing The Eleventh Circuit's Construction Of The DPPA Would Have No Practical Effect On The Outcome Of This Case.

In addition to its interlocutory posture, this case is a poor vehicle for resolving the first question presented because this case will go forward regardless of how that question is answered.

Petitioners seek review of the court of appeals' determination that respondents have a cause of action under the DPPA itself; they do not seek review of the court of appeals' separate determination that even if the DPPA cause of action fails, respondents may pursue their DPPA claims under 42 U.S.C. § 1983. *See* Questions Presented, Pet. i; Pet. App. 6-9. Petitioners' passing assertion in a footnote (Pet. 18 n.4) that reversal of the DPPA holding would, *a fortiori*, require reversal of the § 1983 holding is wrong[7] and, more importantly, does not bring the issue within the questions presented by the petition.

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[7] As the court of appeals' decision makes clear, the question whether a statute provides an express cause of action and whether § 1983 provides an avenue for enforcing federal statutory rights are distinct legal inquiries with their own quite different analyses. *See* Pet. App. 4a-9a.

See, e.g., *Fry v. Pliler*, 127 S. Ct. 2321, 2327-28 (2007) (holding that brief footnote in petition did not put the issue within the question presented); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.* 510 U.S. 27, 31-32, 31 n.5 (1993) (holding that discussion of issue in text of petition did not bring the issue within the questions presented). As a result, even if this Court granted certiorari and reversed the Eleventh Circuit's DPPA holding, respondents would be free to pursue their DPPA claims under § 1983.

D. The Eleventh Circuit's Decision Is Correct.

Certiorari is also unwarranted because the Eleventh Circuit correctly interpreted the DPPA.

1. Petitioners do not question that they fall within the ordinary meaning of "persons." Nor can they reasonably deny that they are among the "persons" Congress specifically had in mind when it spoke of a "person who knowingly . . . discloses . . . personal information, from a motor vehicle record, for a purpose not permitted by" the Act. 18 U.S.C. § 2724; *see also id.* § 2721(a) ("A State department of motor vehicles, *and any officer, employee,* or contractor thereof, shall not knowingly disclose" protected information) (emphasis added). As a result, petitioners grudgingly admit, as they must, that at least in *some* cases, state officials are "persons" intended to be subject to liability when they violate the DPPA. *See* Pet. 15.

Petitioners nevertheless insist that they are not "persons" when they violate the Act by administering a state "policy or practice" that conflicts with the federal law. *Id.* That theory conflicts with the plain

language of the statute, the legal backdrop against which it was enacted, and the basic purposes of the legislation.

The DPPA's broad definition of "person" excludes only States and state agencies, but not state officials. 18 U.S.C. § 2725(2). That exclusion was not accidental. Congress plainly considered who should share in the State's protection from liability, taking the time and care to specify that state agencies as well as the State itself should be outside the scope of § 2724. Nor is it unusual. In excluding States and state agencies, but not state officials in their personal capacities, Congress followed the pattern established by 42 U.S.C. § 1983, the principal federal statute used to remedy violations of federal rights by any "person" acting under color of state law. At the time Congress enacted the DPPA, it was well-established that the word "person" in § 1983 excluded States and state agencies, a result driven in part by this Court's construction of the scope of the Eleventh Amendment. *See Howlett ex rel. Howlett v. Rose*, 496 U.S. 356, 365 (1990); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-66 (1989). But this Court had been equally clear that state officials sued in their personal capacities *are* persons under the statute and are *not* entitled to share in the state's sovereign immunity. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 30-31 (1991). "Officers sued in their personal capacity come to court as individuals," the Court had explained. *Id.* at 27. The fact that a plaintiff's injury arises because the official has misused his or her official powers is cause for condemnation and liability, not for extending to the official the protection from suit afforded to the state itself. *See id.* at 27-28.

The structure of the DPPA confirms that Congress intended the term "person" to have the same meaning in the DPPA. As discussed, the Act uses the same term ("person") as § 1983, and expressly excludes from the definition the entities this Court had excluded from coverage under the same language of the older statute. And in doing so, Congress protected from private suit all entities protected from such suits by the Eleventh Amendment, while allowing suit against those not entitled to the protection of sovereign immunity.

2. Petitioners object that allowing personal-capacity suits against officials for enforcing illegal state policies is inconsistent with § 2723's authorization of the Attorney General to levy civil penalties against any "State department of motor vehicles that has a policy or practice of substantial noncompliance." 18 U.S.C. § 2723(b). That argument fails because Sections 2723 and 2724 serve different, and complimentary, purposes: the private right of action provides a means to redress injuries inflicted upon citizens, while the civil penalty provision recognizes the United States' independent sovereign interest in ensuring compliance with federal law. The remedial provision's different treatment of state officials compared to states and state agencies simply reflects Congress's awareness of the limits of its authority under the Eleventh Amendment, not any intent to provide a safe haven for state officials who blatantly violate federal law. *Cf. Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 763 (2002) (although Eleventh Amendment limits private suits against States, it does not prevent suits brought by the federal government).

Petitioners' interpretation, on the other hand, requires this Court to believe that Congress intended to impose duties upon state officials, in addition to imposing duties on state agencies, but to provide no remedy for the officials' violation of those express duties (only injunctive relief to prevent future violations), having given the Attorney General authority to impose civil penalties only against States and state agencies (and only for a pattern of violations), but not to redress or enforce the statutory obligations of state officials. This illogical gap in the statute's enforcement scheme informs the definition of the word "person" in § 2724(a). Given that the statute expressly imposes duties on state officers, and that state officers, unless otherwise exempted from coverage, are certainly "persons," and that there is no other way to redress their transgressions, the court of appeals' interpretation is more sensible than petitioners'.

II. There Is No Basis To Grant Review Of Petitioners' Eleventh Amendment Challenge To The DPPA.

This Court has repeatedly explained that "the Eleventh Amendment does not erect a barrier against suits to impose 'individual and personal liability' on state officials." *Hafer*, 502 U.S. at 30-31 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974)). Nevertheless, petitioners claim that the Eleventh Amendment is violated "[w]here, as here, a State official is sued for billions of dollars based on nothing more than his or her compliance with State law and when the beneficiary of the [o]fficial's action is the State." Pet. 19. That claim does not warrant this

Court's review. No court has ever accepted it, and it is squarely foreclosed by this Court's precedents.

A. The Eleventh Circuit's Decision Does Not Conflict With The Decision Of Any Other Court.

Petitioners do not attempt to argue that the decision below creates a division of authority over whether the DPPA violates the Eleventh Amendment. Indeed, petitioners appear to be the first litigants to raise an Eleventh Amendment objection to the DPPA's private right of action. Instead, petitioners rely on what they describe as a "marked tension" between the Eleventh Circuit's decision below and the decisions of other courts interpreting different statutes. Pet. 20. That claim provides no basis for certiorari in this case and is baseless in any event.

Petitioners first argue that the decision below is at odds with three decisions construing the False Claims Act (FCA). *See Id.* at 20-21. Yet, two of those cases did not involve state officials or even mention the Eleventh Amendment. *See Smith v. United States*, 287 F.2d 299 (5th Cir. 1961); *United States ex rel. Dunleavy v. County of Del.*, 279 F.3d 219 (3d Cir. 2002), *vacated*, 538 U.S. 918 (2003). The third FCA decision, *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, did involve a state official, but the court explicitly disclaimed that it was deciding any Eleventh Amendment question. 269 F.3d 932, 937 n.3 (8th Cir. 2001) ("[W]e need not consider whether a state official sued in his individual capacity is a person under the FCA or whether the claims against

[the defendant] are barred by the Eleventh Amendment.").[8]

Petitioners next argue that the Eleventh Circuit's holding creates a split with decisions from the Fourth and Seventh Circuits involving two employment statutes: the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). *See* Pet. 21-22. Each involved employees' attempts to hold individual supervisors personally responsible for violations of statutes that impose obligations on the workers' true employer—the State. In such cases, the courts determined that a suit against the supervisor was, of necessity, a suit against the State. *See, e.g.*, *Luder v. Endicott*, 253 F.3d 1020, 1024 (7th Cir. 2001) (finding the effect of such a personal-capacity suit to be "identical to a suit against the state"). But other than establishing the uncontested proposition that the Eleventh Amendment precludes a suit that is, in effect, against the State itself, none of these decisions commits the authoring circuit to hold the DPPA's private right of action unconstitutional. Just as clearly, none of the decisions accepts the constitutional principle petitioners assert in this

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[8] Moreover, the dicta in *Gaudineer* upon which petitioners rely was ill-considered, based on the court's mistaken reading of *Bly-Magee v. California*, 236 F.3d 1014, 1016 (9th Cir. 2001), as holding that in deciding a sovereign immunity claim, the court "should look at whether the alleged conduct of the [official] was 'outside of [his] official duties." 269 F.3d at 937. But the cited passage in *Bly-Magee* was describing the limits of the *absolute immunity* afforded state prosecutorial decisions, an immunity that does not apply when prosecutors act "outside of their official duties." 236 F.3d at 1018 (citing *Fry v. Melaragno*, 939 F.2d 832 (9th Cir. 1991) (involving the scope of absolute immunity for government prosecutors)).

case—*i.e.*, that a suit against a public official violates the Eleventh Amendment when the official is implementing a state policy, but not when the official is acting on his or her own initiative.

It remains possible, of course, that someday one of these circuits, when called upon to decide the question presented in this case, may reach a conclusion in conflict with the Eleventh Circuit's decision here. But until that day comes, there is no need for this Court to intervene to settle petitioners' hypothesized conflict.

B. This Case Presents A Poor Vehicle For Deciding Petitioners' Eleventh Amendment Challenge To The DPPA.

Even if the petition raised an Eleventh Amendment question appropriate for review by this Court, the present interlocutory posture of this case makes it a poor vehicle for resolving that issue.

Petitioners ask this Court to decide whether "a cause of action [1] *for billions of dollars* in damages [2] against State officials *for enforcing State law* for the sole benefit of the State and in compliance with State law requirements" violates the Eleventh Amendment. Pet. i (emphasis added). Neither highlighted aspect of this question is squarely presented in this case in its present preliminary posture. First, petitioners can only speculate as to whether respondents will obtain any judgment at all, how large that judgment may be, and whether the State will choose to indemnify petitioners. Second, respondents have strongly contested petitioners' assertion that their conduct was "in compliance with State law requirements," *id.*, and the lower courts

have never resolved the question. *See* Brief of Appellants at 22-27, *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007) (No. 06-12614).[9] Because this Court's "custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004), the Court should not grant certiorari to decide a question that the lower courts have not concluded is even presented in this case.

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[9] Petitioners rely on Article I, § 24(a) of the Florida Constitution, which provides citizens with "the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state . . . ." However, not every document that a state agency creates constitutes a "public record" within the meaning of this provision. Florida law defines "public records" as documents "made or received pursuant to law or ordinance or in connection with the *transaction of official business* by any agency." FLA. STAT. § 119.011(11) (2005) (emphasis added). While the basic driving records the State maintains may fall within this definition, the databases petitioners developed for sale (consisting of a compilation of data from various official records) were not made for the transaction of any official state business; petitioners created them solely to sell to mass-marketers. Sec. Amend. Compl. ¶ 11. As the Florida courts have explained, "[i]t is not the intent of the [open records] law to put public officials in the business of compiling charts and preparing documentary evidence. The intent is rather to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers." *Seigle v. Barry*, 422 So. 2d 63, 66 (Fla. Dist. Ct. App. 1982), *review denied*, 431 So. 2d 988 (Fla. 1983). Accordingly, Florida law did not compel petitioners to sell the compiled driver databases at issue in this case. *Cf.* 1985 Fla. Op. Att'y Gen. 4. Furthermore, in light of Florida's constitutional right of privacy, *see* Art. I, § 23, disclosure of drivers' information may violate Florida's constitution.

Finally, although required by 28 U.S.C. § 2403 to notify the Attorney General of their constitutional challenge to this federal statute, petitioners have not done so. As a result, the case comes to this Court without the benefit of the participation of the United States in the proceedings below. The Court would be better served by awaiting a case in which the Attorney General has been given a fair opportunity to defend the constitutionality of the Act in the court of appeals and to participate in the certiorari process in this Court.

C. The Eleventh Amendment Does Not Bar This Suit.

Petitioners' Eleventh Amendment challenge lacks merit in any event. This Court has repeatedly held that the Eleventh Amendment does not bar personal-capacity suits against public officials and none of the Court's decisions has turned on the amount of the damages claimed against the defendants. *See Hafer*, 502 U.S. at 30-31 (1991); *Scheuer v. Rhodes*, 416 U.S. 232 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999). Petitioners nevertheless claim that the result must be different when the official is acting in compliance with an invalid state law or when the official is indemnified by the State and cannot satisfy the judgment on his own. This Court's precedents preclude both claims.

1. In *Hafer*, this Court explicitly rejected the petitioners' first assertion. Much like petitioners here, the petitioner in *Hafer* "[sought] to overcome the distinction between official- and personal-capacity suits by arguing that . . . liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when injuring the plaintiff." 502 U.S. at 27. This Court, however, held that the Eleventh Amendment did not prohibit subjecting state officials to personal liability for acts "both within the official's authority and necessary to the performance of governmental functions." *Id.* at 28. Accordingly, this Court and others have allowed imposition of civil, or even criminal, liability against public officials enforcing state law or policy, for the benefit of the state, when the state law was clearly preempted by federal law. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002) (holding state prison officials liable under § 1983 for implementing state policy found to be unconstitutional); *Guinn v. United States*, 238 U.S. 347 (1915) (upholding criminal liability for officials who conspired to deprive legal citizens their right to vote by enforcing a state constitutional amendment contrary to the Fifteenth Amendment); *Sullivan v. Barnett*, 139 F.3d 158, 179-80 (3d Cir. 1998) (holding that state officials may be liable in their individual capacity for following unconstitutional state regulations), *rev'd on other grounds sub nom. by Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

"To be sure," this Court recognized in *Hafer*, "imposing personal liability on state officers may hamper their performance of public duties. But such concerns are properly addressed within the framework of our personal immunity jurisprudence."

502 U.S. at 31. Accordingly, the law protects public officials from unfair liability for enforcing state law through the doctrine of qualified immunity, not by conferring absolute sovereign immunity for their unlawful conduct. *See id.* at 29.

2. This Court's precedents also dictate that a State's decision to indemnify its officials for violations of federal law does not immunize them from personal liability.

Though the Eleventh Amendment precludes the involuntary imposition of a judgment for money damages directly upon the State, it does not apply when a State volunteers to be subject to such a judgment or to bear its costs.[10] This Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). As a result, the Eleventh Amendment permits a federal court to impose a money judgment upon a state when it has consented to suit by statute or litigation conduct. *See Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619-20 (2002).

As the courts of appeals have uniformly concluded, there is no basis for a different conclusion

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[10] Contrary to petitioners' suggestion (Pet. 22), nothing in *Edelman v. Jordan*, 415 U.S. 651 (1974), is to the contrary. *See Greiss v. Colorado*, 841 F.2d 1042, 1046 (10th Cir. 1988) ("*Edelman* was concerned with claims for retroactive relief that *by their nature must* be paid from public funds, not actions directed against individuals that may ultimately be satisfied with state monies solely because the state has chosen to provide indemnification.").

when the State voluntarily consents to pay judgments imposed upon state officials for violations of federal law. *See Sales v. Grant*, 224 F.3d 293, 297-98 (4th Cir. 2000); *Jackson v. Ga. Dep't of Transp.*, 16 F.3d 1573, 1577-78 (11th Cir. 1994); *Berman Enters., Inc. v. Jorling*, 3 F.3d 602, 606 (2d Cir. 1993); *Greiss v. Colorado*, 841 F.2d 1042, 1045 (10th Cir. 1988); *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994); *Spruytte v. Walters*, 753 F.2d 498, 512 & n.6 (6th Cir. 1985), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995); *Demery v. Kupperman*, 735 F.2d 1139, 1147-48 (9th Cir. 1984). To hold otherwise would

> permit a state to eviscerate completely the rule that governmental officers are not immune from monetary liability when sued in their individual capacities. And this evisceration would come at no cost to the states, for . . . once a state promised to indemnify officers sued in their individual capacities, the 'insurance fund' established to finance the promised indemnification would not have to contain any funds at all, given that all suits in federal court against state officers would be prohibited absent consent by the state.

Sales, 224 F.3d at 298.

III. The Eleventh Circuit's Rejection Of Petitioners' Qualified Immunity Defense On The Pleadings Does Not Warrant Review.

Petitioners also ask this Court to review the Eleventh Circuit's fact-bound determination that, on the pleadings of this case, petitioners are not entitled to qualified immunity. Recognizing that the Eleventh Circuit's decision does not raise any legal question dividing the lower courts, petitioners instead ask this Court to grant certiorari to consider an unprecedented revision to established qualified immunity doctrine, asserting that qualified immunity protects them from the consequences of their clearly unlawful conduct so long as it was not clearly established that their actions pursuant to state law subjected them to personal liability. That invitation should be denied.

1. Qualified immunity shields state officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case, the court of appeals had little difficulty deciding that petitioners' conduct violated respondents' clearly established rights under the DPPA. The Act plainly prohibited petitioners from selling respondents' private drivers information without their consent, yet petitioners sold the information anyway.

To be sure, petitioners claim they were acting to comply with state law which, they say, required the disclosures. But, even if that were true, reasonable officials in petitioners' position could not have

believed that their conduct was lawful. For over a century, this Court has made clear that when faced with a conflict between local and national law, the Supremacy Clause requires state officials to conform their conduct to the requirements of federal law. *See, e.g.*, *Ex parte Young*, 209 U.S. 123 (1908); *Poindexter v. Greenhow*, 114 U.S. 270 (1885); *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738 (1824).[11] Of course, when the mandate of federal law, or the conflict with state law, is unclear, the fact that an official was acting in compliance with state law may lend support to a claim of qualified immunity. *See* Pet. 24-25. The Eleventh Circuit did not hold otherwise. Instead, the court simply concluded that there was no ambiguity about petitioners' obligations in this case. *See* Pet. App. 9a (finding that the "words of the DPPA alone are 'specific enough to establish clearly the law applicable to particular conduct and circumstances'" in this case, thereby precluding any claim of qualified immunity) (citation omitted).

Denying qualified immunity in such circumstances is entirely consistent with the

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[11] For this reason, petitioners' argument that this Court's opinion in *Reno v. Condon* "did not address the scope of the preemption or discuss the preemption of particular State laws" is unavailing. Pet. 23-24. Even absent the decision in *Condon* it should have been perfectly clear to reasonable state officials that they were prohibited from disclosing the information the DPPA made confidential, any state law to the contrary notwithstanding. Moreover, to say that this Court's opinion in *Condon* did not address the scope of the DPPA's preemption is not accurate. The Court made quite clear that because the Act was a constitutional exercise of Congress's legislative authority, South Carolina officials were compelled to comply with it, even though state law directed otherwise. *See* 528 U.S. at 147-48.

decisions of this Court and other courts of appeals. Neither this Court nor any other has ever held that "courts should presume that officials are entitled to qualified immunity" whenever "State law imposes obligations on State officials" in conflict with federal law. Pet. 25. Moreover, both this Court and the courts of appeals have routinely denied qualified immunity for officials purporting to follow state law when the conduct violated clearly established federal rights. *See, e.g.*, *Hope*, 536 U.S. at 741-46 (holding that state prison officials were not entitled to qualified immunity for Eighth Amendment violations though they followed the State's Department of Corrections' practice of handcuffing inmates to a hitching post for refusing to work); *Lane v. Wilson*, 307 U.S. 268, 269-77 (1939) (upholding verdict against state election officials enforcing state election law in violation of Fifteenth Amendment); *Nixon v. Herndon*, 273 U.S. 536, 539-41 (1927) (allowing damage suit to proceed against state election officials who in following state law violated the Fourteenth Amendment); *Guillemard-Ginorio v. Contreras-Gomez*, 490 F.3d 31 (1st Cir. 2007) (rejecting qualified immunity for insurance commissioners who suspended agent licenses under a Puerto Rico Insurance Code that clearly violated due process); *Lawrence v. Reed*, 406 F.3d 1224, 1233 (10th Cir. 2005) (same for chief of police who enforced clearly unconstitutional derelict vehicle ordinance); *Jackson v. Rapps*, 947 F.2d 332, 333, 338-39 (8th Cir. 1991) (same for defendants who implemented a reimbursement policy under state law contrary to existing federal regulations).

At any rate, even if this Court adopted the presumption petitioners advocate, it would do them

no good in this case. *See* Pet. App. 9a-10a. Such a presumption easily would be overcome given the DPPA's clear and unequivocal prohibition and petitioners' presumed (and, in this case, actual) knowledge of both the federal prohibition and its supremacy.

2. Petitioners also argue that they are entitled to qualified immunity because their personal liability for violating respondents' clearly established federal rights was not clearly established until the decision in this case. Pet. 25-27. Such arguments have been rejected by every court of appeals to consider them,[12] and for good reason—they are directly contrary to this Court's decisions and the underlying purposes of the qualified immunity doctrine.

Qualified immunity turns solely on the clarity of the defendant's legal obligations and the unlawfulness of his or her conduct. *See, e.g.*, *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (explaining that the qualified immunity inquiry focuses on "whether it would be clear to a reasonable officer that his *conduct* was unlawful in the situation he confronted") (emphasis added); *Anderson v. Creighton*, 483 U.S. 635 (1987) (same); *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999) (same); *Harlow*, 457 U.S. at 819 (same).[13] "No other 'circumstances' are relevant to

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[12] *See, e.g.*, *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 947-48 (9th Cir. 2003); *Del A. v. Edwards*, 855 F.2d 1148, 1152 (5th Cir. 1988).

[13] The cases petitioners cite are not to the contrary: each case looks to whether the right, rather than the remedy, was clearly established. In *Anderson v. Creighton*, this Court held—in the very language petitioners quote (Pet. 26)—that the "contours of the *right* must be sufficiently clear that a

the issue of qualified immunity." *Davis v. Scherer*, 468 U.S. 183, 191 (1984).

Nor would any legitimate purpose be served by immunizing state officials who knew they were engaging in unlawful behavior, simply because they may have reasonably believed that they could get away with the violation without subjecting themselves to personal liability. Qualified immunity exists to avoid discouraging officials from exercising their discretion and disrupting government with insubstantial claims when federal obligations were unclear. *Harlow*, 457 U.S. at 816-17. But when "an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate." *Id.* at 819.

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reasonable official would understand that what he is *doing* violates *that right.*" 483 U.S. at 640 (emphasis added). Nothing in *Anderson* suggests that once the contours of the plaintiff's substantive right is clear, qualified immunity may nonetheless be available if the availability of a cause of action for damages was not yet clearly established. Petitioners' citation to a footnote in *Davis v. Scherer*, 468 U.S. 183 (1984), *see* Pet. 26, is no more availing. There, this Court rejected the argument that qualified immunity was defeated because the defendants' conduct, in addition to violating a federal right, also violated a clear *state* regulation. This was so, the Court explained, because the state regulation was not the "statute or regulation [that provided] the basis for the cause of action sued upon." *Id.* at 194 n.12. That statement did not purport to establish that qualified immunity requires both a violation of a clearly established federal right as well as the existence of a clearly established federal cause of action. It simply held that what must be clearly established is the right that forms the "basis of the cause of action sued upon" (*i.e.*, the federal claim), rather than some other state or federal right that is not the subject of the plaintiff's claim. *Id.*

Here, petitioners not only failed to hesitate, but made a conscious decision to defy the clearly established requirements of federal law, when they knew that any state law requirement to the contrary must yield. The Eleventh Circuit's decision to deny qualified immunity in such circumstances is neither troubling nor worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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